Office-Supreme Court, U.S.
FILED
SEP 22 1965
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 455

In the Matter of

ANONYMOUS, an Attorney,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York (hereafter referred to as "the Court of Appeals") made and entered on May 20, 1965, which denied petitioner's motion for leave to appeal to the Court of Appeals, without opinion.

Statement of the Case

Petitioner on August 26, 1963, served upon respondent a notice of motion for an order granting discovery and inspection of all testimony, statements and exhibits in respondent's possession, returnable September 10, 1963 in the Supreme Court of the State of New York, Appellate Division, First Department (hereafter referred to as "the Appellate Division"), which denied petitioner's application, unanimously, by order dated October 3, 1963.

Petitioner, on November 6, 1963, moved in the Appellate Division, for an order granting leave to reargue or, in the alternative, for leave to appeal to the Court of Appeals, which was unanimously denied by order dated November 19, 1963.

Thereafter, petitioner's application for leave to appeal to the Court of Appeals was denied by that Court by order dated January 9, 1964.

This Court denied petitioner's application for a writ of certiorari on May 18, 1964 (*Matter of Anonymous, an Attorney,* 377 U. S. 933).

All of the above proceedings took place before commencement of petitioner's hearings before the Referee on November 9, 1964, which continued for a period of 25 days during which the testimony of many witnesses was taken. On the last hearing date, April 22, 1965, petitioner completed his case. (The respondent had completed its case on February 10, 1965.) The Referee has, since the filing of the instant petition, filed his report with the Appellate Division.

Petitioner, on February 15, 1965, and during the aforesaid hearings, served respondent with an order to show cause returnable in the Appellate Division, directing the respondent to disclose all statements, testimony and documents in respondent's possession not already disclosed. The application was denied unanimously by the Appellate Division on March 18, 1965.

Petitioner, by notice dated April 27, 1965, moved in the Court of Appeals for leave to appeal to said Court from the Appellate Division's May 18, 1965 order. Almost concurrently, on April 29, 1965, petitioner applied for a stay of the disciplinary proceedings, to Judge Stanley H. Fuld of the Court of Appeals, which application was denied. Thereafter, on May 20, 1965, the Court of Appeals denied, without opinion, petitioner's application for leave to appeal, 15 N. Y. 2d 487.

With the instant application, petitioner has been before this Court twice with the same demand. The only distinction between petitioner's original application, denied by this Court on May 18, 1964 (*Matter of Anonymous, an Attorney, supra*), and the instant petition, is the time element: petitioner's first application was made before the commencement of the hearings; this application is made upon completion of the hearings, but prior to a final disposition of the matter.

It remains for the Appellate Division to act upon the findings of the Referee after receiving briefs from both sides. Only then will that Court make an adjudication of petitioner's right to continue the practice of law.

POINT I

The order sought to be reviewed is not a final order within the meaning of the Constitution of the State of New York, and the petition for a writ of certiorari should be denied on the grounds of non-finality.

It is patently clear that the order sought to be reviewed is an intermediate order, made in a pending disciplinary proceeding, and the order sought to be reviewed does not finally determine that proceeding.

Similar applications to reach the minutes of the prior testimony given by witnesses in preliminary investigations conducted by respondent, have been denied by the Court of Appeals on the ground that the orders appealed from would not finally determine the proceeding within the meaning of the Constitution of the State of New York, *Matter of Greenberg*, 9 N. Y. 2d 1013 (1961) and *Matter of Anonymous, an Attorney*, 13 N. Y. 2d 1119, cert. denied 377 U. S. 933.

The Court of Appeals has held that an order of the Appellate Division denying an attorney's application for reinstatement to the Bar is not a final order, *Matter of Lewis*, 7 N. Y. 2d 787; and that an order of the Appellate Division temporarily suspending an attorney from the practice of law would not finally determine the proceeding within the meaning of the Constitution of the State of New York, *Matter of Golenbock*, 9 N. Y. 2d 971.

POINT II

The general policy of this Court is not to grant piecemeal review of litigation which has not been finally determined below.

The jurisdiction of this Court with respect to writs of certiorari to the highest court of a State is defined in Title 28, U. S. C., 1257 and in Rule 19, 1, 1(a) and 1(b) of the Rules of the Supreme Court of the United States, effective July 1, 1954; and none of the requirements laid down therein are met by the facts in this case.

As this Court held in *Parr* v. *United States,* 351 U. S. 513, 518, 519 (1955):

> ". . . In general, a 'judgment' or 'decision' is final for the purpose of appeal only 'when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.' *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28. This rule applies in criminal as well as civil cases. *Berman* v. *United States,* 302 U. S. 211, 212-213.
>
> ". . .
>
> "To hold this order 'final' at this stage of the prosecution would defeat the long-standing policy against piecemeal appeals."

This Court held in *Catlin* v. *United States,* 324 U. S. 229, 233-234 (1944):

> ". . . The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up

> in fragments . . .' *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

See also, *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 178 (1954).

Petitioner in his brief (p. 8) relies upon *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1448, and *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 S. Ct. 972, 976, 92 L. Ed. 1212 (1947). These cases are not controlling here. In *N. A. A. C. P.* v. *Alabama* there was involved an application to review a judgment of civil contempt, and this Court said in its opinion at pp. 466-467:

> ". . . The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears to be by appeal, after a hearing on the merits *and final judgment by the lower state court. Only from the disposition of such an appeal can review be sought here.*" (Emphasis supplied.)

Republic Natural Gas Co. v. *Oklahoma* is authority for the opposite of petitioner's contentions, since this Court held therein at p. 67 of its opinion:

> "Ever since 1789, Congress has granted this Court the power of review in State litigation only after 'the highest court of a State in which a decision in a suit could be had' *has rendered a 'final judgment or decree.'* 237 of the Judicial Code, 28 U. S. C. 344, rephrasing 25 of the Act of September 24, 1789, 1 Stat. 73, 85. Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the federal judicial

system, unlike that of some of the States. This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitutional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations." (Emphasis supplied.)

and this Court stated further in *Republic Natural Gas Co.*, at pp. 70-71:

"... Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction. See citation of cases in the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, 345, 348."

POINT III

Upon the merits, the petition for writ of certiorari should be denied, since the proceedings in the state court adequately safeguarded petitioner's rights.

Petitioner's rights were more than amply protected from the inception of his disciplinary action and throughout the hearings before the court-appointed Referee:

(1) Petitioner was given written notice by respondent of the institution of the preliminary investigation of his practice in the prosecution of personal injury claims prior to the interrogation of any witnesses by the Committee.

(2) The investigation was directed only to closed accident cases.

(3) Petitioner was granted the privilege of being represented by counsel of his own choice when he was interrogated during the preliminary investigation, and his counsel was present and participated in the preliminary hearings, even though this Court has held in *Anonymous 6 and 7* v. *Baker,* 360 U. S. 287 (1959), that in a preliminary investigation such as this, which is analogous to a Grand Jury investigation, counsel for an attorney may not be present in the hearing room during his interrogation.

(4) Witnesses other than petitioner who were interrogated during the preliminary investigation of petitioner's professional conduct were granted the right of counsel.

(5) Petitioner was permitted to obtain a copy of the transcript of his testimony given in the preliminary investigation.

(6) Petitioner has had his full day in court during the hearings held before the Referee, and at which the rules of evidence were applied. He was confronted with witnesses who testified against him and was given the fullest opportunity to cross-examine such witnesses. Throughout the disciplinary proceedings, the rule of disclosure, as set down in *People* v. *Rosario,* 9 N. Y. 2d 286, has been scrupulously followed. The respondent provided petitioner with a transcript of the witnesses' testimony in the preliminary inquiry and all pertinent exhibits and notes, upon the completion of testimony by every witness upon direct examination at the hearings.

Not one scintilla of legal justification appears to support petitioner's present application. He seeks and has sought with every application for disclosure, what is clearly beyond the normal remedies available to any party, whether the action be civil or criminal. Petitioner is not content with his rights under *Rosario;* he would embark on a fishing expedition of the first magnitude if given the opportunity to do so. Some pertinent language of the Court of Appeals in *Rosario* may be in order here:

> "... It does not mean that the defense will be able to go on a tour of investigation seeking general useful information. Our decision pre-supposes that the statement relates to the subject matter of the witness' testimony, that it is to be used for impeachment purposes only after direct examination."

See also: *People* v. *Malinsky,* 15 N. Y. 2d 86 (quotation therefrom set forth on page 75a, Petition herein).

Petitioner persists in making the unwarranted assumption that evidence which would aid him in making his

defense is being withheld by respondent. This position is not supported by the facts and respondent has never made any statement, on or off the record, to the contrary, as suggested by petitioner (Pet. brief, pp. 3, 7). In an effort to support his allegation that due process has been denied him, petitioner has improperly colored the simple meaning of a concession made by counsel for respondent, which should be quoted at length:

> "The Referee: We are now turning to the respondents' case. You have a request to make Mr. Feldman?
>
> Mr. Feldman: Yes, I do. At this time I would like to ask the petitioner to concede that there were witnesses interviewed by the petitioner other than those who were produced in the petitioners' case before your Honor.
>
> Mr. Fitzpatrick: I'll concede that." (Trial record, p. 2174.)

It is respectfully submitted that the above does not constitute an admission that any evidence in aid of petitioner's defense has been or is being withheld by respondent. Respondent has neither suppressed nor withheld any evidence which would aid petitioner's defense.

The three questions posed by petitioner (Pet. brief, pp. 3, 4) are improper and an analysis of the proceedings below clearly fails to produce any *bona fide* Constitutional issue:

(1) As to petitioner's question one, there was never an admission made by respondent to the effect that it was holding undisclosed evidence which could aid petitioner's defense; and

(2) As to petitioner's questions two and three, it is clear that there has been no denial by respondent of any "normal

and regular discovery procedure" available to petitioner. Rather, respondent has fully complied with the prevailing law of New York as set forth in *Rosario, supra.* Upon completion of testimony of each witness on direct examination before the Referee, respondent produced for petitioner, a copy of the transcript of such witnesses' testimony in the preliminary and all other memoranda, exhibits, etc., in connection therewith, and petitioner had uninhibited use of such materials.

Petitioner relies, in his argument, upon the case of *Brady* v. *State of Maryland,* 373 U. S. 83, 87, 83 S. Ct. 1194. The holding in the *Brady* case is not controlling here. *Brady* involves a charge of suppression by the prosecution of a confession of guilt made by one defendant, which was material to the guilt or punishment of a second defendant who was convicted of murder in the first degree. This has no relevancy to the instant case, which is a disciplinary proceeding. The decision of this Court in *Brady* is not authority for the proposition that a respondent in the disciplinary proceeding should be authorized to examine all material gathered by the Co-ordinating Committee on Discipline in its preliminary investigation in order to pick out whatever he thinks would be favorable to him.

Petitioner also cites *Smith* v. *Pennsylvania,* 376 U. S. 354, 84 S. Ct. 763, in support of his argument. *Smith* turned upon a misapprehension on the part of State authorities as to what the Federal Bureau of Investigation was willing to disclose, and this Court therefore remanded the case to make available to the defense certain material, disclosure of which the F. B. I. was not opposing.

Petitioner also cites *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 83 S. Ct. 1175, in support of his

argument. This case is not applicable here. *Willner* involved questions of procedure before the Character Committee where there was no confrontation of witnesses against the applicant to admission to the Bar and no opportunity on the part of applicant to cross-examine such witnesses, and no subsequent trial such as has been had in the instant matter.

POINT IV

The New York Civil Practice Law and Rules, Section 3101, is not applicable in the instant matter and petitioner has not been deprived of due process nor denied the equal protection of the laws.

The New York Civil Practice Law and Rules, Sec. 3101, relied upon by petitioner with respect to discovery and inspection, applies to ordinary civil actions and proceedings in the same way that the provisions of the Civil Practice Act did. Section 3101 of the C. P. L. R. is not controlling or dispositive with respect to a disciplinary proceeding, which does not fall within the category of an ordinary civil action or proceeding. A special situation exists with respect to discovery and inspection in disciplinary proceedings; and this situation has been passed upon by the Appellate Division in other disciplinary proceedings over the past years, and in each case, that court unanimously denied motions such as that brought by petitioner (see *Matter of Shields & Myers,* orders dated December 3, 1959 and July 6, 1960; *Matter of Greenberg,* order dated March 21, 1961; *Matter of Kiley,* order dated January 18, 1963; all being orders of the Appellate Division, First Department).

A disciplinary proceeding is obviously not a criminal proceeding (*Matter of Randel,* 158 N. Y. 216). *Matter of Mathot,* 222 N. Y. 8, which petitioner cites, is a 1917 decision which apparently has been cited only twice, both times in the same year, 1917 (*Matter of Brandmacher,* 222 N. Y. 522, and *Matter of Carpel,* 222 N. Y. 523). *Mathot* has not been cited since by the Court of Appeals in the past 46 years. Of more significance here, is *Cohen* v. *Hurley,* 7 N. Y. 2d 488, affirmed, 366 U. S. 117; petition for rehearing denied, June 17, 1963, which indicates that a disciplinary proceeding and the preliminary investigation that precedes it are not ordinary civil proceedings, since that case holds that an attorney, as an officer of the court, must come forward and account for his conduct when called upon to do so by a duly authorized inquiry; and this is certainly not true with respect to a respondent or defendant in an ordinary civil proceeding.

A disciplinary proceeding, in our opinion, may be defined as a special type of civil proceeding, subject to such reasonable procedural orders as the Appellate Division of the Supreme Court, in the discretion granted to it under Sec. 90 of the Judiciary Law, directs. Some authorities state that a disciplinary proceeding is neither criminal nor civil [Drinker, *Legal Ethics,* p. 36], and that it is *sui generis* [58 (1960) Michigan Law Review, 1218 *et seq.*].

CONCLUSION

It is respectfully urged that petitioner's constitutional rights have never been denied him by respondent. However, if petitioner persists in the claim that he has been deprived of the equal protection of the laws or that due process has been denied him, he has a right to appeal from whatever final determination the Appellate Division may make in the pending disciplinary proceeding.

The petition for writ of certiorari should be denied.

September, 1965

Respectfully submitted,

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